



**Before The
State Of Wisconsin
DIVISION OF HEARINGS AND APPEALS**

In the Matter of the Appeal of the Revocation of
Charles and Sharon Slater's Driveway Access
Permit (67-27-66) by the Department of
Transportation

Case No.: TR-13-0009

FINAL DECISION

In accordance with Wis. Stat. §§ 227.47 and 227.53(1)(c), the PARTIES to this proceeding are certified as and this final decision is sent by U.S. mail:

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By letter dated March 15, 2013, the Department of Transportation (hereinafter "Department") notified property owners Charles and Sharon Slater (hereinafter "the Slaters") that it was revoking driveway access permit (67-27-66). By letter dated April 8, 2013, Attorney James Hammes, on behalf of the Slaters, requested a hearing pursuant to Wis. Stat. § 86.073(3) to review the revocation decision. Pursuant to due notice, a contested case hearing was conducted by Administrative Law Judge Rachel Pings in Milwaukee, Wisconsin on July 17, 2013, August 22, 2013 and August 23, 2013. The parties agreed to file closing briefs no later than September 27, 2013 with the opportunity for reply briefs no later than October 11, 2013. Both parties timely filed closing and reply briefs.

Pursuant to the procedure described in Wis. Stat. § 227.46(2m), on November 22, 2013, the Administrative Law Judge issued an Amended Proposed Decision (hereinafter "Proposed Decision") and the parties were afforded the opportunity to respond within 15 days. On December 6, 2013, the Slaters submitted their objections and brief in opposition to the Proposed Decision and the Department filed a letter in support of the Proposed Decision. On December 17, 2013, the Department filed objections to the Slaters' brief.

The Slaters advance six objections to the Proposed Decision. Ultimately, the objections raised are not persuasive as explained immediately below. After reviewing the record in this matter, the Proposed Decision is adopted as the Final Decision.

Administrator's Response to Objections*Objection 1*

The Slaters' first objection relates to their motion *in limine* to preclude the admission of evidence the Department created after its March 15, 2013 letter denying the driveway permit. The Slaters contend that the Administrative Law Judge erred by denying the motion *in limine*. Relying on Wis. Stat. § 86.073(3), the Slaters argue that the record should have been limited to those facts and documents that were already in existence before the Department made its decision to revoke the driveway. The portion of Wis. Stat. § 86.073(3) upon which the Slaters rely states that when revoking a driveway permit, the Department "... shall notify the applicant of the action and the grounds for the action..." The fact is that the Department, in its March 15, 2013 denial letter, did state the grounds for its action. Those grounds were stated generally. They included improving the safety and efficiency of the highway and that the Slaters' had reasonable alternative access to the highway. The Slaters then challenged those grounds on appeal. In response, the Department compiled evidence and examples to support the reasonableness of its position. For example, the Slaters asserted that the driveway was safe and in response the Department took video and/or photographs of the driveway in May 2013 to establish that motorists were using the driveway illegally. (Ex. 15) Likewise, when the Slaters challenged the reasonableness of the alternative access based upon difficulty of delivery vehicles entering by Springdale Road, the Department created turning radius / movement diagrams to establish the contrary. (Ex. 23) The Department was allowed to create and introduce evidence to support the grounds it stated for its decision. It is worth noting that the Slaters also introduced evidence created after the Department's decision.

Objection 2

The Slaters' second objection relates to the Department's motion *in limine* to preclude testimony and evidence regarding eminent domain. At the outset, I reject the notion that the Administrative Law Judge misstated the record by characterizing a verbal motion as a motion. Rules of evidence in contested case hearings are relaxed and this helps to prevent form over function. See Wis. Stat. § 227.45(1). As to the merits of the objection, I also reject the contention that the Administrative Law Judge committed reversible error by granting the Department's motion *in limine*. A contested case hearing regarding a driveway permit revocation under Wis. Stat. § 86.073 is separate and distinct from an eminent domain proceeding under Wis. Stat. Ch. 32. The Administrative Law Judge properly determined that the Division of Hearings and Appeals lacks jurisdiction over matters of eminent domain and permitted the Slaters to make a record on the issue to preserve it for appeal.

Objection 3

The Slaters' third objection is that the Administrative Law Judge incorrectly interpreted who should be considered a permit applicant under Wis. Stat. § 86.073(3). The original permit applicant sold the property, which was divided into 3 separate parcels. The driveway is situated upon the parcel owned by the Slaters. The Slaters contend that the Department was nevertheless required to give notice of revocation of the driveway permit to the owners of all 3 parcels because each of those property owners has an equal right to use the driveway permit. This is not persuasive. The record does not contain evidence to support the Slaters' assumption that the

property owners of all 3 parcels have an equal right to use the driveway permit and the case cited for the first time by the Slaters, *O’Connell v. Blasius*, 82 Wis.2d 728, 734-35, 264 N.W.2d 561 (1978), is inapposite here. It concerned a different statute regarding when the attorney general must be served in declaratory judgments actions.

Objection 4

The Slaters’ fourth objection is that the Administrative Law Judge erred by “*sua sponte*” determining that access to Springdale Road alone, as opposed to access to Springdale Road and Heritage Lane, constituted reasonable alternative access. This was not a *sua sponte* determination and it was not erroneous. A proper issue before the Administrative Law Judge was whether the Slaters had reasonable alternative access to their property if the subject driveway permit were revoked. In its March 15, 2013 decision to revoke the driveway permit, the Department cited two possible access alternatives:

“...As part of the DOT’s responsibility to maintain a safe and efficient highway system, it would not be appropriate to allow this permitted access to this parcel of land when the property currently has reasonable access via easement to Springdale Road to the west. There is also existing cross access with the property to the east where access to Heritage Lane (the north frontage road) can be attained. The safety of the public is best served if your access is not onto the major highway but rather onto the side road...”

The Slaters read this to mean that the Department’s revocation must fail unless both Springdale Road and Heritage Lane were proven to constitute reasonable alternative access. However, that is not what the Department’s revocation decision said and the Slaters fail to demonstrate that the law requires it. The Department relied upon two possible locations as reasonable alternative access points for the Slaters. The Administrative Law Judge determined that one of them constituted reasonable alternative access. This was not outside the scope of the Administrative Law Judge’s authority but rather, it was the proper resolution of a primary issue before her. As noted in the Proposed Decision, the Slaters cited no law requiring that the Slater property have more than one reasonable alternative access point.

Objection 5

The Slaters’ fifth objection is that the Administrative Law Judge erred by determining that the Slater property was not entitled to direct access to a highway. The Slaters cite Wis. Admin. Code § Trans 231.03(2)¹ for the proposition that each property fronting a highway is entitled to at least one driveway. This is a misreading of the law. Trans § 231.03 governs the location, design and construction requirements of driveways. Subsection (2) provides that: “The number of driveways permitted serving a single property frontage along a state trunk highway shall be the minimum deemed necessary by the department for reasonable service to the property without undue impairment of safety, convenience, and utility of the highway.” The Slaters contend, without citation to authority, that the minimum number of driveways is “necessarily

¹ The objection mistakenly cites to § 231.03(3) but clearly intended to refer to § 231.03(2).

‘one’” such that if the Department revokes the only driveway with direct access to the highway, then the Department must provide direct access to another public right of way. There is not support in the law for this conclusion. Rather, the controlling law as to property rights in general, notwithstanding whether the highway is controlled or not, is as stated in the Proposed Decision: property access rights involve “only the right to enter and leave the property without being forced to trespass across the land of another.” *Surety Sav. & Loan Ass’n v. State Department of Transp. Division of Highways*, 54 Wis.2d 438, 444, 195 N.W.2d 464 (1972). This means that the minimum number of driveways permitted under Trans 231.03(2) can be zero where, as in this case, a property owner can access a public right of way without trespassing.

Objection 6

The Slaters’ sixth and final objection is that the Department’s primary witness, Patrick Hawley, was not sworn as a witness. This objection is waived to the extent it was not raised at hearing and furthermore, it is undeveloped since the Slaters provided no authority or argument to support it. Regardless, the transcript evidences that immediately after Mr. Hawley was called as a witness, a technical difficulty caused the hearing recorder to stop in error for a brief period of time. In all likelihood, the Administrative Law Judge did swear in the witness but it was simply not recorded.

Issues for Hearing

The Administrator states:

The proper issue for the hearing is whether the factual grounds set forth in the Department’s March 15, 2013 notice to the Slaters revoking driveway access permit (67-27-66) were true and if so, whether those grounds constitute a reasonable basis for the revocation. As elucidated by the Department in its closing brief, this presents the following two legal issues: (1) whether the Department’s decision to revoke the driveway access permit is consistent with the criteria for regulating access to highways as set forth in Wis. Stat. § 86.07(2) and Wis. Admin. Code Chapter 231; and (2) whether the revocation would deprive the Slaters of reasonable access to their property. The Department bears the burden of proof by a preponderance of the evidence.

The Slaters moved *in limine* to limit the hearing to the issue of whether the revocation would deprive them of reasonable access to their property and therefore, to exclude testimony and/or evidence supporting safety as the Department’s basis for revocation. In support of the motion, the Slaters argued that the Department did not put them on sufficient notice that safety was a reason for the revocation. At hearing, the Administrative Law Judge denied this motion *in limine*. The Department’s March 15, 2013 notice clearly referenced safety as a basis for the revocation. (See Ex. 20)

The Department also filed a motion *in limine*. The Department’s motion argued for the exclusion of testimony and/or evidence relating to eminent domain and/or the market value of the Slaters’ driveway access. In support of its motion *in limine*, the Department contended that such matters were irrelevant to a permit revocation appeal under Wis. Stat. § 86.073(3). At hearing, the Administrative Law Judge granted this motion *in limine* on that basis. An Administrative Law Judge’s authority is strictly confined to that directly conferred by statute. In fact, courts have stated that there is no proposition of law better established than that

administrative agencies have only such powers as are expressly granted to them or necessarily implied and any power sought to be exercised must be found within the four corners of the statute under which the agency proceeds. *American Brass Co. v. State Board of Health*, 245 Wis. 440, 448, 15 N.W.2d 27 (1944). Further, such statutes are strictly construed to preclude the exercise of a power which is not expressly granted. *Village of Silver Lake v. Wis. Dept. of Revenue*, 87 Wis. 2d 463, 468, 275 N.W.2d 119 (Ct. App. 1978). Issues relating to eminent domain and/or market value are properly decided within the statutory scheme of Wis. Stat. Ch. 32 and for the Division of Hearings and Appeals to assert jurisdiction would be to render it superfluous, which runs afoul of proper statutory construction. The Slaters were permitted to make an offer of proof on this matter to preserve the issue for appeal.

Findings of Fact

The Administrator finds:

1. On or about January 26, 1966, the Department acquired all access rights to a parcel of land located adjacent to and north of Highway 18 in the vicinity of the northeast quadrant of the intersection of Highway 18 and Springdale Road in the City of Waukesha, Wisconsin. (Exs. 2 and 16A) The 1966 conveyance that effectuated the Department's acquisition explicitly excluded two access points to Highway 18 "pursuant to the provisions of Section 86.07(2), Wisconsin Statutes." (Ex. 16A) In other words, the conveyance allowed the then-owners of the property to retain the right to apply for driveway access permits for the two excluded access points.
2. Then-owner Sunray DX Oil Co. applied for a driveway access permit and on or about July 22, 1966, the Department issued to Sunray DX Oil Co. a permit to install an access driveway to Highway 18. (Ex. 1) The permit number was 67-27-66. (Ex. 1)
3. On or about October 5, 1979, the Slaters² took ownership of some of the parcel of land, which included the part covering the driveway that was created as a result of driveway access permit number 67-27-66. (Exs. 106 and 108) The driveway is angled and designed to be used as ingress only from Highway 18. The driveway also contains a "do not enter" sign to alert motorists not to enter Highway 18 from it. (Ex. 141) However, vehicles sometimes use the driveway for egress to Highway 18. (Ex. 15; Hawley testimony; Payne testimony)
4. The Slater property is a rectangular-shaped parcel that is currently improved with one office building, within which the Slaters' architectural business and other offices are housed, and a small parking lot. (Exs. 2 and 127) The Slater property is bordered on the south by Highway 18, on the west by a square-shaped parcel of land currently occupied by an AT&T store and its parking lot, on the north by a trapezoid-shaped parcel of land formerly occupied by Pizza Hut and its parking lot, and on the east by a mostly rectangular-shaped parcel of land currently occupied by a Sonic drive-through restaurant and its parking lot. (Ex. 2) The Slater parcel is the smallest of the four and is exclusively

² The property was first owned by Charles Slater Architects, Inc., and transferred on or about December 31, 1985 to the Slaters personally. (Ex. 108)

interior to the others. Its only direct access to a public roadway is the driveway between it and Highway 18.

5. Highway 18 borders the collective properties to the south, Heritage Lane borders the collective properties to the northeast, and Springdale Road borders the collective properties to the southwest. As a consequence, there are 2 ways by which someone may indirectly access the Slater parcel from a public roadway other than Highway 18: (1) a driver coming from Heritage Lane may enter the Sonic parking lot at either of its two entrances and pass through the Sonic parking lot to the Slater property, or (2) a driver coming from Springdale Road may enter the AT&T parking lot and pass through the AT&T parking lot to the Slater property. (See Ex. 2) The Slater property maintains an easement to the AT&T property, which in turn has access to Springdale Road. (Ex. 100-1)
6. The Department is planning a reconstruction project for a seven mile stretch on Highway 18 from Manhattan Drive to 124th Street. This includes the Springdale Road intersection. The reconstruction project is slated to begin in 2017. (Ex. 6, p. 3; Hawley testimony; Ex. 18)
7. During a 2008 Safety Assessment conducted for the project, the intersection of Highway 18 and Springdale Road was flagged as one of 11 intersections with a high crash rate. (Ex. 6, p. 6; Hawley testimony)
8. Pursuant to a 2008 Access Management Plan conducted for the project, recommended changes to Highway 18 were made consistent with the following three criteria: access management principles, safety, and operations. (Ex. 7, pp. 3-4) The access management principles were explained as follows:

a. *Promote functional hierarchy of streets and intersections:* As a major arterial and US highway, USH 18 should intersect primarily with similarly classified roadways. Therefore, there should be minimal direct access with driveways, local streets or even collector roadways. The preservation of USH 18 takes precedence over all side streets and driveways.

b. *Limit direct access to major roadways:* The number of access points onto USH 18 should be limited.

c. *Locate signals to favor through movements:* Traffic signals should be located one quarter to one half mile to promote progression along USH 18. The signals should be timed to favor USH 18, the major arterial.

d. *Preserve the functional area of intersections:* Driveways and other intersections should not be located within the influence area of major intersections. The functional area encompasses storage requirements (through and turn lanes plus taper lengths), maneuver distances and acceleration/deceleration areas upstream and downstream of the intersection.

e. *Limit the number of conflict points:* Restricting movements at lower classified intersections reduces conflicts and creates a safer intersection.

- f. *Separate conflict points*: Ensure motorists have adequate time to identify and respond to each conflict point (intersection, turn lane, median opening, etc.) before another conflict point is introduced. Proper spacing of intersections and driveways improves safety and operations.
- g. *Remove turning vehicles from through lanes*: Ensure each intersection has appropriate right and left-turn lanes.
- h. *Manage left-turn movements with a raised median*: Raised medians provide greater flexibility in restricting or eliminating left-turn movements.
- i. *Provide a well-supporting street network*: Local and collector streets and private cross easements minimize unnecessary trips on the major arterials and enhance the safety and operation of the entire street network.” (Id., emphasis in original)

Of the recommended changes, many driveways along Highway 18 were recommended to be closed based upon the above-mentioned access management principles and safety. (Id., pp. 4-10; Hawley testimony). This included the driveway associated with access permit number 67-27-66 on the Slater property. (Id., p. 5)

9. In 2009, a traffic study was conducted for the project to guide its design. (Ex. 8) The traffic study included existing traffic volumes, traffic forecasts, intersection operational analyses and recommended intersection geometry. (Id. at p. 4) This demonstrated that the functional area of the westbound intersection at Highway 18 and Springdale Road spans 215 feet from the intersection. (Id., p. 32 [*Exhibit 5A*]) The driveway associated with access permit number 67-27-66 on the Slater property is approximately 200 feet from the intersection, meaning that it falls within the functional area of the intersection. (Ex. 2; Hawley testimony)
10. By letter dated August 2, 2012, the Department notified the Slaters that it intended to remove the driveway associated with access permit number 67-27-66 on the Slater property as necessary for the reconstruction project. (Ex. 18)
11. The Department initially commenced negotiations to acquire the Slaters’ driveway access by eminent domain. (Ex. 113). Ultimately, however, by letter dated September 6, 2012, the Department notified the Slaters that it was revoking driveway access permit number 67-27-66. (Ex. 19)
12. By letter dated March 15, 2013, the Department notified the Slaters that it was upholding its decision to revoke driveway access permit number 67-27-66 and of the right to appeal to the Division of Hearings and Appeals. (Ex. 20) The Slaters timely appealed.
13. As stated in its March 15, 2013 letter, the basis for the Department’s decision to revoke driveway access permit number 67-27-66 is that safety and efficiency on Highway 18 would be increased and the Slaters have reasonable alternative access to their property via Springdale Road to the west and/or Heritage Lane to the east. (Ex. 20)
14. The removal of the driveway access from the Slater property to Highway 18 will improve traffic safety and efficiency on Highway 18. The Slater property will still have access to

Highway 18 by passing through the AT&T parking lot and using Springdale Road. This constitutes a reasonable alternative access to the existing subject driveway.

Discussion

Property owners have a right to access their property, but when said property abuts a public highway owners must obtain from the Department a permit for access from the property to the highway. Wis. Stat. § 86.07(2). The Department has the authority to condition such permits as necessary for the “preservation of highways” and “the safety of the public.” *Id.* Furthermore, the number of driveways allowed for “a single property frontage along a state trunk highway shall be the minimum deemed necessary by the department for reasonable service to the property without undue impairment of safety, convenience, and utility of the highway.” Wis. Admin. Code Trans § 231.03(2). Consequently, the Department has the authority to deny a permit or to revoke a permit once it has been issued. Wis. Stat. § 86.073; *J & E Investments LLC v. Division of Hearings and Appeals*, 2013 WI App 90 at ¶ 18, 349 Wis.2d 497, 835 N.W.2d 271. If the Department revokes a permit, it must notify the permit holder of a right to administrative review before the Division of Hearings and Appeals. Wis. Stat. § 86.073(3). That review mechanism is the genesis for the instant appeal by the Slaters.

I. The Department did not create a jurisdictional defect by not providing notice of the permit revocation to owners of the properties that abut the Slater property.

It is uncontested that the Slaters were the only property owner the Department notified of the permit revocation. The Slaters contend that this created a jurisdictional defect because Wis. Stat. § 86.073 required the Department to provide notice of revocation to all property owners who may use the driveway at issue (Slater, AT&T and Sonic); as opposed to only the owner of the property upon which the permitted driveway is located (Slater). I disagree.³ Wis. Stat. § 86.073(3) plainly directs the Department to “notify the applicant” of the action, the grounds therefor and appeal rights. Here, the original permit applicant was a company who owned the parcel in 1966; well before the Slaters took ownership. However, when the Slaters became the property owner, they effectively became the permit holder and therefore, they are the sole entity to whom the Department was required to provide notice of the permit revocation. This is supported by a recent Court of Appeals decision in which the court explained that ownership of driveway access permits transfers with ownership of the property. See *J & E Investments LLC v. Division of Hearings & Appeals*, 2013 WI App 90 at ¶ 4. To adopt the Slaters’ argument on this point would be to deprive the Department of the ability to revoke a driveway access permit once a property has been sold to a new owner, which is directly contrary to Wis. Stat. §§ 86.07 and 86.073. How users of abutting properties may use the driveway in question is properly considered within the confines of the issues of safety and reasonable alternative access, which will be addressed below.

³ This decision addresses the merits of Slater’s argument. However, I agree with the Department that the Slaters’ argument fails on the procedural grounds that: (1) the Division of Hearings & Appeals lacks specific statutory authority to remedy it if true and (2) it was not timely raised. (See Department’s Reply Brief at pp. 8 and 10)

II. Revoking the subject driveway permit is likely to increase safety and efficiency on Highway 18.

In its March 15, 2013 notice to the Slaters of the decision to revoke, the Department provided the following grounds:

“... Since the state highway system is generally the higher tier roadways having the most traffic and the higher speeds, mobility is a major concern and access can and does interfere with the ability of the highway to function in an acceptable manner. Access points onto highways create problems with the carrying capacity of highways, with the safety of highways and with the speed of travel on those highways. Every additional driveway onto any highway can add up to 7 additional conflict points where crashes can occur as well as causing traffic to slow down for the car making the turning movement. The Transportation Research Board of the National Academies has reviewed studies throughout the United States and has published guidance showing that more accesses directly correlates to more crashes. The department has the responsibility to assure that the system is safe while meeting the needs of the traveling public and those of adjacent property owners.

Currently USH 18 in this area is classified as a Tier 3, 6-lane divided highway with an Average Daily Traffic of about 37,000 vehicles per day. As part of the DOT’s responsibility to maintain a safe and efficient highway system, it would not be appropriate to allow this permitted access to this parcel of land when the property currently has reasonable access via easement to Springdale Road to the west. There is also existing cross access with the property to the east where access to Heritage Lane (the north frontage road) can be attained. The safety of the public is best served if your access is not onto the major highway but rather onto the side road...” (Ex. 20)

These grounds were amply supported by the record; primarily through the testimony of and exhibits related to the testimony of Professional Engineer Patrick Hawley.

Mr. Hawley is a licensed Professional Engineer and certified Professional Traffic Operations Engineer who, for the last 10 years, has been employed as a Traffic Engineer with R.A. Smith National, Inc., a local company that provides civil engineering, transportation, land development, and survey services. He has had significant education, training and experience evaluating traffic and safety operations and communicating his findings and recommendations to those responsible for projects involving the design and/or improvement of roadways. He is particularly proficient in access management principles, having prepared his master’s thesis on the topic, having been involved with the National Academies Transportation Research Board Access Management Committee for many years, and having personally reviewed and critiqued the Access Management Manual prepared by same. (Ex. 9) He describes access management in its most basic sense as a proactive way to enhance roadway safety and operations. As for a technical definition, access management is “the systematic control of the location, spacing, design, and operation of driveways, median openings, interchanges, and street connections to a

roadway.” (Ex. 9, p. 3) In the traffic engineering field, the principles of access management are well-recognized and they guided Mr. Hawley as he made recommendations to the Department on its plan to improve seven miles of Highway 18 (“the corridor”). His testimony was credible and consistent with the record.

In 2008, in his capacity as project manager for R.A. Smith National, Inc., Mr. Hawley prepared a Safety Assessment of the corridor and concluded that Highway 18 had a high number of crashes and a correspondingly high crash rate. (Ex. 6, p. 7) He attributed this to the number, location and design of access points, high travel speeds, and the number of lanes. (Id.) Of the 19 intersections existing within the corridor, Mr. Hawley’s study flagged 11 of them as having a high crash rate and therefore, being in need of safety improvements.⁴ (Id., p. 6) The intersection at Springdale Road was one of those intersections. (Id.) Mr. Hawley used the Safety Assessment and access management principles to create an Access Management Plan in which recommendations were made for the project. (Ex. 7) Of relevance to this case, the Access Management Plan recommended that many driveways along Highway 18 be closed. (Ex. 7, pp. 4-10; Hawley testimony). This included the driveway associated with access permit number 67-27-66 on the Slater property. (Ex. 7, p. 5)

The Department established that the recommendation to close the Slater driveway was carefully thought-out and ultimately necessary to address safety concerns. Highway 18 is a multilane urban arterial highway that crosses through the City of Waukesha, the Town of Brookfield, the City of Brookfield, and the Village of Elm Grove. (Ex. 9, p. 4) It carries some of the highest traffic volumes along a surface street in the state, with an average 21,300 to 46,500 vehicles per day. (Id.) It is important for the motoring public traveling this highway to have the safest and most efficient experience possible, and relying on well-established principles of access management is the best way to ensure this. As it relates to driveways like the one on the Slater property, this means that Highway 18 needs access control, that the functional area of its intersections needs to be preserved, and that the number of conflict points needs to be limited and spaced as much as possible. (Ex. 9, pp. 7-8) To briefly elucidate, roadways like Highway 18 that serve high volumes of through traffic need more access control to preserve traffic safety and function; whereas frequent and direct property access, such as driveways, are more compatible with the function of local and collector roadways. (Id.) Hierarchy among the different types of roadways needs to be prioritized. Intersections within Highway 18 are areas where motorists are responding, decelerating, and maneuvering into the appropriate lane to stop or complete a turn; serious traffic conflicts can be caused by access points, such as driveways, that are too close to intersections. (Id.) Furthermore, drivers make more mistakes and are more likely to have accidents when they are presented with complex driving situations created by multiple conflict points. A conflict point is anywhere there is potential for a collision. This unequivocally includes driveways. A less complex driving environment is accomplished by limiting the number and type of conflict points. Likewise, safety increases as conflicts points are spaced out. This is because drivers need sufficient time to address one potential set of conflicts before facing another. Drivers need adequate perception and response time, such that separating conflict areas helps to simplify the driving task and contributes to safety. (Id.; see also Ex. 11)

⁴ A crash rate threshold of 1.5 crashes per million entering vehicles had typically been used by the Department. However, because a previous study of part of the same corridor had been done using a crash rate threshold of 1.0 and because 1.0 was becoming the standard practice in the field at the time, Mr. Hawley reasonably used a threshold of 1.0 to determine which intersections had a high crash and therefore warranted safety improvements. (Ex. 6, p. 6; Hawley testimony)

The subject driveway directly conflicts with these basic tenants of access management and accordingly, it compromises Highway 18's efficiency and safety. The driveway provides direct access from the highway to the Slater property, which defies the preferred hierarchy and constitutes a conflict point for highway motorists. Furthermore, although the driveway exists prior to the beginning of the right turn lane of the intersection, it nevertheless falls within the functional area of the intersection at Highway 18 and Springdale Road. Consistent with the record, Mr. Hawley credibly explained that the functional area of an intersection includes its queue (the line of vehicles waiting at the intersection), the deceleration area behind the queue, and the driver perception/reaction area behind that. In other words, the functional area of an intersection includes much more than just the actual vehicles waiting at a stoplight. According to Department policy as memorialized in the State Highway Maintenance Manual, "connections should not be allowed within the functional area of an intersection." (Ex. 15, p. 5 ¶ 7b.3) The functional area of the intersection at Springdale Road is expected to extend 215 feet from the intersection. (Ex. 8, p. 32 [*Exhibit 5A*]); Hawley testimony) Given that the subject driveway is approximately 200 feet from the intersection, it clearly falls within the functional area and this poses the potential for unsafe conditions as described above. For example, motorist A intending to use the driveway from Highway 18 to the Slater property must decelerate during approach. Motorist B traveling behind motorist A must correspondingly decelerate and may not do so at a sufficiently quick pace because it will be unclear to motorist B whether motorist A is slowing for a right turn at the driveway or for a right turn at Springdale Road using the signaled intersection. Whether or not actual accidents have occurred as such is not dispositive. The fact is that the location of the subject driveway is in direct conflict with well-established engineering and Department guidelines and policies and therefore presents an unacceptable risk of unsafe conditions. The Department need not wait until an accident occurs to make changes. The Department's proactive safety stance is appropriate.

In an apparent attempt to reveal the Department's actions in closing the Slater driveway as arbitrary, the Slaters devoted significant attention to other intersections in the corridor and particularly to a driveway to Tires Plus which is located in a different stretch of the corridor at the intersection of Highway 18 and Parklawn Drive. (See Ex. 3) The Department is not seeking to revoke access rights to that driveway. I decline to address this red herring, as the Division of Hearings and Appeals is charged and authorized only with determining whether the subject driveway's closure is warranted by safety and efficiency concerns and whether the property serviced by the subject driveway has reasonable alternative access. The circumstances of the Tires Plus driveway versus the subject driveway are not equivalent. As one significant example, the traffic volume for the right turn lane at the Parklawn intersection is significantly lower than that for the right turn lane at the Springdale Road intersection. (Ex. 8, p. 20 [*Exhibit 2A*])

Having determined that safety considerations warrant removal of the driveway, the next inquiry is whether reasonable alternative access to the Slater property exists, since the Department cannot land lock a property.

III. Springdale Road provides the Slater property with reasonable alternative access.

The Slater building is situated between the AT&T building to its west and the Sonic building to its east. (Ex. 2) The properties each have their own parking lot but the motoring public can travel freely, meaning without having to access a public roadway, between the parking lots. (Ex. 2) Highway 18 borders the collective properties to the south, Heritage Lane

borders the collective properties to the northeast, and Springdale Road borders the collective properties to the southwest. (Exs. 2 and 3) As a consequence, there are 3 ways by which someone may access any of the properties from a public roadway: (1) via Highway 18 at the subject driveway; (2) via Heritage Lane at one of the two entrances to the Sonic parking lot;⁵ and (3) via Springdale Road at the entrance to the AT&T parking lot. (Exs. 2 and 3)

At the outset, this decision rejects the notion that the Slater property is somehow legally entitled to *direct* access to a public right of way. To the contrary, the Wisconsin Supreme Court has ruled that property access rights involve “only the right to enter and leave the property without being forced to trespass across the land of another.” *Surety Sav. & Loan Ass’n v. State Department of Transp. Division of Highways*, 54 Wis.2d 438, 444, 195 N.W.2d 464 (1972). It is undisputed that the Slater property maintains an easement to the AT&T property, which in turn has access to Springdale Road. The Slaters would not be forced to trespass for access to Springdale Road and therefore, no property access right is abridged by using Springdale Road as access alternative to the subject driveway. The alternative access need only be reasonable.

The Department contends that the Springdale Road alternative is reasonable access for the Slater property in the event that the subject driveway is removed and this decision agrees with that. It is important to note that the subject driveway is available in the first place as an entrance-only⁶ option and only to a portion of potential visitors. Namely, it is available only to those motorists traveling westbound on Highway 18 who would turn right onto the driveway to enter the Slater property. Without the driveway, those same motorists could simply continue west on Highway 18, at which point they would pass and be able to see the Slater property to their right, turn right at the intersection onto Springdale Road (which is only 200 feet from the driveway), make the first right on Springdale Road into the AT&T parking lot, and continue through the parking lot directly to the Slater property. This is the manner by which visitors to the Slater property coming from any other direction already access the property.⁷

I am unpersuaded by the Slaters’ attack on the reasonableness of the Springdale Road driveway based upon its proximity to the intersection. Comparing the Springdale Road driveway to the subject driveway is comparing apples to oranges since, as explained in the above section, the subject driveway is connected to a major highway whereas the Springdale Road driveway is connected to a lesser priority roadway, and one with a much lower traffic volume, such that it is better suited to handle the conflict point.

The increase of traffic to the Highway 18 / Springdale Road intersection and to Springdale Road as a result of diverting visitors from the driveway is negligible. Unfortunately, the most recent estimate of average daily traffic entering the driveway is from City of Waukesha

⁵ Heritage Lane is a frontage road connected to Highway 18 at, as relevant to this case, Springdale Road and Parklawn Avenue (see Ex. 3). Once on Heritage Lane, a motorist can enter the Sonic parcel at two separate junctures and travel directly to the Slater parcel. The Slaters contend that no legal easement exists for Slater property visitors to use the Sonic parking. It is unnecessary to address whether Heritage Lane constitutes reasonable alternative access given the conclusion that Springdale Road constitutes reasonable alternative access. No law requires that the Slater property have more than one reasonable alternative access.

⁶ No motorist is legally allowed to exit from the driveway onto to Highway 18, although this apparently does frequently occur, which provides even more justification for closing the driveway for safety reasons.

⁷ Motorists coming from Highway 18 eastbound would turn left onto Springdale Road at the intersection and turn right into the AT&T parking lot as usual and motorists coming from Springdale Road southbound would turn left into the AT&T parking lot as usual.

Plan Commission Meeting minutes from 1982, which worked under the assumption that 200 to 400 vehicles used the driveway on an average day. (Ex. 107-10) The Department introduced testimony and evidence indicating that this estimate is no longer accurate⁸ and that far fewer vehicles currently use the driveway on an average day. (Bauman testimony; Ex. 8, p. 20; Ex. 27) Regardless, even assuming for purposes of this decision that closing the driveway would cause 200 to 400 vehicles per day to divert from the driveway to Springdale Road, this would not adversely affect the safety of the intersection. To the contrary, removing the driveway as a conflict point and requiring all traffic to use the same intersection is actually likely to enhance safety. Also, with far lower traffic volumes than Highway 18 and a lower speed limit, Springdale Road is better suited to handle the conflict point and traffic. Likewise, the increased time and distance of traveling 200 extra feet as a result of the aforementioned diversion is negligible and easily outweighed by the likely increase in safety. Finally, if larger trucks / semis are diverted from the driveway to Springdale Road, they too can be effectively managed at the intersection and on Springdale Road, just as those that do not presently use the driveway are. Much was made of this issue at hearing, but ultimately, the Department demonstrated that the turning radius for larger trucks / semis has been aptly accounted for in the planning of the new project. (Johnson testimony; Ex. 23)

The use and nature of the Slater property must also be considered and supports the conclusion that Springdale Road constitutes reasonable alternative access. It is an office building, which is a “destination” location as opposed to a “drive by” location. In other words, people coming to the Slater property are generally predetermined to go there because they have some business there. Consequently, the offices do not generally rely upon visibility and access to the building. This is in stark contrast to, for example, the Sonic drive-through restaurant, a gas station or even a strip mall, where visibility, access and impulse often influence motorist customers. The inquiry here is only whether Springdale Road constitutes reasonable alternative access. As noted above, the Division of Hearings and Appeals is without authority to determine whether removing the driveway may monetarily devalue the Slater property in some way.

In conclusion, the record in this matter demonstrated that Springdale Road and the easement through the AT&T property constitutes reasonable alternative access to the Slater property. However, if at some time in the future, the Springdale Road access point is eliminated or otherwise rendered unreasonable, then the Slaters can apply to the Department for a driveway access permit pursuant to Wis. Stat. § 86.07(2). Just as an approved driveway access permit does not exist into perpetuity, neither does the revocation of one.

Conclusions of Law

The Administrator concludes:

1. Pursuant to Wis. Stats. § 86.073(1), the Department has the authority to revoke driveway access permit number 67-27-66.

⁸ This word was changed from the Proposed Decision to correct a typographical error. The Proposed Decision mistakenly used the term “inaccurate.”

2. Pursuant to Wis. Stat. §§ 86.07(3), 227.43(1)(bg) and 227.47, the Division of Hearings and Appeals has authority to issue this proposed decision.
3. The Department's decision to revoke driveway access permit number 67-27-66 is reasonable and consistent with the standards set forth in Wis. Stat. § 86.07(2).
4. Access at Springdale Road constitutes reasonable alternative access to the Slater property in lieu of driveway access permit number 67-27-66.

ORDER

The Administrator orders:

The Department of Transportation's decision to revoke driveway access permit number 67-27-66 issued for the property now owned by Charles and Sharon Slater is hereby **AFFIRMED**.

Dated at Milwaukee, Wisconsin on January 13, 2014.

STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS
5005 University Avenue, Suite 201
Madison, Wisconsin 53705
Telephone: (608) 266-8007
FAX: (608) 264-9885

By: _____
Brian Hayes
Administrator

NOTICE

Set out below is a list of alternative methods available to persons who may wish to obtain review of the attached decision of the Division. This notice is provided to insure compliance with Wis. Stat. § 227.48 and sets out the rights of any party to this proceeding to petition for rehearing and administrative or judicial review of an adverse decision.

1. Any person aggrieved by the attached order may within twenty (20) days after service of such order or decision file with the Division of Hearings and Appeals a written petition for rehearing pursuant to Wis. Stat. § 227.49. Rehearing may only be granted for those reasons set out in Wis. Stat. § 227.49(3). A petition under this section is not a prerequisite for judicial review under Wis. Stat. §§ 227.52 and 227.53.
2. Any person aggrieved by the attached decision which adversely affects the substantial interests of such person by action or inaction, affirmative or negative in form is entitled to judicial review by filing a petition therefore in accordance with the provisions of Wis. Stat. §§ 227.52 and 227.53. Said petition must be filed within thirty (30) days after service of the agency decision sought to be reviewed. If a rehearing is requested as noted in paragraph (1) above, any

party seeking judicial review shall serve and file a petition for review within thirty (30) days after service of the order disposing of the rehearing application or within thirty (30) days after final disposition by operation of law. Any petition for judicial review shall name the Division of Hearings and Appeals as the respondent. The Division of Hearings and Appeals shall be served with a copy of the petition either personally or by certified mail. The address for service is:

DIVISION OF HEARINGS AND APPEALS
5005 University Avenue, Suite 201
Madison, Wisconsin 53705-5400

Persons desiring to file for judicial review are advised to closely examine all provisions of Wis. Stat. § 227.52 and 227.53 to insure strict compliance with all its requirements.